

Weintraub v Utica First Ins. Co.

2008 NY Slip Op 33301(U)

December 9, 2008

Supreme Court, New York County

Docket Number: 604265/07

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART _____

Index Number : 604265/2007

WEINTRAUB, RICHARD

vs.

UTICA FIRST INSURANCE

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

DEC 10 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/9/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RICHARD WEINTRAUB, LIANE WEINTRAUB and
AMERICAN INTERNATIONAL INSURANCE COMPANY
OF CALIFORNIA, INC.,

Plaintiffs,

-against-

Index No.: 604265/07

UTICA FIRST INSURANCE COMPANY, MY HOME
REMODELING, INC., MY HOME LLC, 907
CORPORATION, BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT, LLC, RDM
RENOVATION CORP., 905 5TH ASSOCIATES, INC.,
PAMELA LIPKIN and RICK KRAMER,

Defendants.

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WALTER TOLUB, J:

In their complaint filed in this action, plaintiffs Richard Weintraub and Liane Weintraub (the Weintraubs) and their insurer American International Insurance Company of California, Inc. (AIG) seek a declaratory judgment that (1) the insurance policies issued by defendant Utica First Insurance Company (Utica) to defendant My Home Remodeling, Inc. (My Home Inc.) provides coverage to the Weintraubs as additional insureds, with respect to the underlying property damage lawsuit filed against them by 905 5th Associates, Inc. (5th Associates) and its owner Pamela Lipkin (Lipkin), in the Supreme Court, New York County under Index Number 100662/06 (the Underlying Lawsuit); and (2) Utica is obligated to defend, indemnify and reimburse plaintiffs in the Underlying Lawsuit.

Utica moves pursuant to CPLR 3211 (a) (1) and (7), seeking a dismissal of the complaint. In the motion, Utica also requests that its motion be treated as one for summary judgment, pursuant to CPLR 3211 (c), declaring that Utica has no obligation to defend and indemnify the Weintraubs with respect to the Underlying Lawsuit, or to reimburse the Weintraubs' insurer, AIG, for the amounts expended by it in connection therewith. In opposition, plaintiffs cross-move for summary judgment in their favor, pursuant to CPLR 3212.

For the reasons stated therein, Utica's motion is granted, and plaintiffs' cross motion is denied.

Background

The Weintraubs, who are insured by AIG, are the owners of a cooperative apartment located at 969 Park Avenue, New York City. In September of 2005, the Weintraubs entered into a contract with My Home LLC, an affiliate of My Home Inc., to perform renovation work on the apartment prior to taking occupancy (the Renovation Project). Lipkin, a physician and the sole shareholder of 5th Associates, owns the cooperative unit immediately below the Weintraubs' apartment, where she uses the unit to practice cosmetic surgery (the Medical Office). It is undisputed that My Home Inc., a construction company closely affiliated with My Home

LLC,¹ procured insurance coverage from Utica at all times relevant to the Underlying Lawsuit (the Utica Policies). It is also undisputed that Robert C. Mangi Agency, Inc. (Mangi) was at all relevant times an authorized agent of Utica. It is further undisputed that in November of 2005, in response to My Home's request and in connection with the Renovation Project, Mangi issued a Certificate of Insurance naming the Weintraubs (and others) as additional insureds under the Utica Policies that were in effect in 2005. Thereafter, on January 13, 2006, Mangi also issued another Certificate of Insurance naming the Weintraubs (and others) as additional insureds under the Utica Policies that were in effect in 2006. Copies of the Certificates of Insurance (which contained exclusionary language, as explained below) are annexed as exhibits E and F of the cross motion papers, and the Utica Policies are annexed as exhibit A of the moving papers.

In the Underlying Lawsuit, it is alleged that 5th Associates and Lipkin suffered significant business losses due to physical damages to the Medical Office, in connection with the Renovation Project that was started on or about January 13, 2006 by My Home at the Weintraubs' apartment. Thereafter, in February 2008, the Weintraubs and AIG commenced the instant action against Utica and My Home, as well as other defendants in their nominal capacities,

¹ The two related entities are referred to hereinafter collectively as My Home, unless the context otherwise requires.

alleging that Utica is obligated to provide insurance coverage to the Weintraubs in the Underlying Lawsuit based on their purported status as additional insureds under one or more of the Utica Policies. Based on the documents submitted with their pleadings, including the Certificates of Insurance and the Utica Policies, the parties seek summary judgment in their respective favor.

Standards Governing Summary Judgment Motions

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Following the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. See e.g., *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006) (because entry of summary

judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion") (citations omitted).

However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-325. Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether she has stated one". *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2nd Dept 2005). Also, if the "documentary evidence flatly contradicts the factual claims [alleged in the complaint], the entitlement to the presumption of truth and the favorable inference is rebutted." *Scott v Bell Atlantic Corp.*, 282 AD3d 180, 183 (1st Dept 2001).

Judgment Should Be Granted In Favor Of Utica

In its motion to dismiss, Utica argues, among other things, that: (a) the Weintraubs are not entitled to be treated as an insured or additional insured under the Utica Policies because they are not named on the face, or in the endorsement, of such Policies; and (b) the Certificates of Insurance issued by Mangi

are insufficient to establish that the Weintraubs as additional insureds under the Utica Policies.

In opposition to Utica's motion to dismiss and in support of their cross motion for summary judgment, plaintiffs argue that: (1) an implied-in-fact contract was formed between My Home and the Weintraubs, as to My Home's obligation to procure insurance coverage for the Weintraubs, with respect to the Renovation Project; and (2) My Home asked Utica's authorized agent, Mangi, to issue the Certificates of Insurance wherein the Weintraubs are named as additional insureds, and Utica is estopped and bound by the actions of its agent, and has a duty to defend and indemnify the Weintraubs and AIG in the Underlying Lawsuit.

Plaintiffs' arguments are unavailing for various reasons. First, under the Utica Policies, in order for an entity to be treated as an additional insured, My Home must be obligated, in writing and by contract, to name such entity as an additional insured, in accordance with the blanket additional insured endorsement provisions of the Utica Policies (the Blanket Endorsement). Here, it is undisputed that the contract between My Home and the Weintraubs did not require My Home to obtain insurance coverage for the Weintraubs as additional insureds. Therefore, the Blanket Endorsement was not triggered, and the Weintraubs are not entitled to be considered as insureds or additional insureds under the Utica Policies. *Moleon v Kreisler*

Borg Florman General Construction Co., Inc., 304 AD2d 337, 339 (1st Dept 2003) (“[t]he party claiming insurance coverage has the burden of proving entitlement ... A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage”) (internal citations omitted).

Moreover, with respect to the Certificates of Insurance issued by Mangi wherein the Weintraubs were named as additional insureds, each of these Certificates contain therein bold capital letters the following statements: “THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.” A virtually identical statement of disclaimer has been held by the Appellate Department, First Department, to be insufficient to establish that the named certificate holder was an additional insured under an insurance policy, where the policy itself made no provision for coverage. *Moleon, supra*, at 339. See also *Alib, Inc. v Atlantic Casualty Insurance Company*, 52 AD3d 419 (1st Dept 2008); *Glynn v United House of Prayer for All People*, 292 AD2d 319, 322 (1st Dept 2002); *Herbert St. George v W.J. Barney Corp.*, 270 AD2d 171, 172 (1st Dept 2000). Therefore, the law is well-settled in the First Department that a certificate of insurance issued only for informational purposes confers no rights on the holder, even if it purports to name such holder as an additional insured, when

the underlying insurance policy made no provision for coverage.

The handful of cases cited by plaintiffs for a contrary proposition do not bind this Court, as such cases originated from the Appellate Division, Third Department. See e.g., *Lenox Realty Inc. v Excelsior Ins. Co.*, 255 AD2d 644 (3d Dept 1998) (insurer equitably estopped from denying coverage where party for whose benefit the insurance was procured relied on the certificate of insurance to that party's detriment); *Bucon, Inc. v Pennsylvania Manufacturing Association Ins. Co.*, 151 AD2d 207, 210 (3d Dept 1989) ("by issuing the certificate of insurance in which plaintiff was named as an additional insured, [insurer] was estopped from denying coverage for plaintiff").

In accord with the First Department, but in disagreement with the Third Department, the Second Department has ruled that: (1) a certificate of insurance issued only for information purposes and conferred no rights on the holder was insufficient to establish that the plaintiff was insured by the insure; and (2) even if the insurer might be held liable for the acts of its agent, "the doctrine of [equitable] estoppel may not be invoked to create coverage where none exists under the policy," despite the fact that the agent issued the certificate of insurance that named the plaintiff as an additional insured. *American Ref-Fuel Company v Resource Recycling, Inc.*, 248 AD2d 420, 423-24 (2d Dept 1998) (2nd Dept 1998). In so ruling, the Second Department also

held that the defendant insurer was "not obligated to defend and indemnify the plaintiff in the underlying action." *Id.* at 424.

In light of the foregoing, and based on the documentary evidence submitted by the parties in connection with this action, this Court concludes that plaintiffs are not entitled to recover from Utica on account of the Utica Policies, nor is Utica obligated to defend, indemnify and/or reimburse plaintiffs in connection with the Underlying Lawsuit.²

Accordingly, it is

ORDERED that the motion of defendant Utica First Insurance Company (Utica) to dismiss (which is treated as one for summary judgment) is hereby granted, and the complaint as against Utica is hereby severed and dismissed, and the Clerk of the Court is directed to enter judgment in favor of Utica; and it is further

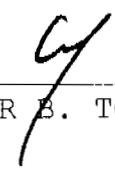
ORDERED that the plaintiffs' cross motion for summary judgment is hereby denied; and it is further

² In so holding, this Court need not decide the issue as to whether My Home Inc. and My Home LLC, as plaintiffs argue, "are in effect one company and should be treated as such" for purposes of the Utica Policies issued to, and in the name of, My Home Inc. Plaintiffs' Reply Affirmation, paragraphs 9-10. Because plaintiffs are not entitled to coverage under the Utica Policies, as a matter of law, the distinction between My Home Inc. and its affiliate My Home LLC is irrelevant and moot.

ORDERED that the remainder of the action shall continue.

Counsel for the parties are directed to appear for a preliminary conference on January 30, 2009 at 11AM in room 335 at 60 Centre Street.

Dated: 12/9/08



WALTER B. TOLUB J.S.C.

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